

**Willingham  
& Côté, P.C.**  
attorneys & counselors at law

333 Albert Avenue, Suite 500, East Lansing, MI 48823-4394  
(517)351-6200 Fax (517)351-1195  
www.willinghamcote.com

FREDERICK M. BAKER, JR., OF COUNSEL  
(517) 324-1069 - DIRECT DIAL  
fbaker@willinghamcote.com - E-MAIL  
WEBSITE: [WWW.FBAKERLAW.COM](http://WWW.FBAKERLAW.COM)

SEPTEMBER 16, 2015

LARRY ROYSTER, ESQ.  
CLERK OF THE COURT  
MICHIGAN SUPREME COURT  
PO Box 30052  
LANSING, MI 48909



RE: PROPOSED AMENDMENTS TO MCR 7.215

DEAR MR. ROYSTER:

I WAS PRIVILEGED TO ADDRESS THE COURT THIS MORNING ON THE SUBJECT REFERENCED, BUT, OWING TO QUESTIONS, WAS UNABLE TO COMPLETE MY REMARKS, WHICH I HAD TIMED AT THREE MINUTES. IF YOU DEEM IT PROPER TO DO SO, I PROVIDE THE FOLLOWING TEXT OF MY COMPLETE REMARKS FOR DISTRIBUTION TO THE COURT, FOR WHATEVER VALUE THEY MAY HAVE.

THE OFFICE OF A PER CURIAM OPINION IS TO APPLY SETTLED LAW TO NEW FACTS.

UNDER THE CURRENT RULE, PER CURIAM OPINIONS – AND THEY ARE WHAT IS INVOLVED, AS MEMORANDUM OPINIONS ARE NOT OFTEN CITED -- ARE “NOT PRECEDENTIALLY BINDING UNDER THE RULE OF STARE DECISIS,” BUT THEY ARE CITABLE FOR WHATEVER PERSUASIVE VALUE THEY MAY HAVE, SO LONG AS A COPY IS PROVIDED TO COURT AND COUNSEL.

THE PROPOSED AMENDMENT OF SUBSECTION C OPERATES TO DEPRIVE THE COURT OF APPEALS (AND LITIGANTS APPEARING BEFORE IT) OF THE BENEFIT OF ANY UNPUBLISHED DECISION UNLESS IT “DIRECTLY RELATES” TO THE CASE AT ISSUE.

OTHERS HAVE COMMENTED ON THE IMPRECISION OF THIS STANDARD, SO I WILL ADD ONLY THAT (1) LAWYERS REASON BY ANALOGY TO SIMILAR SITUATIONS, SO IT MAY BE DEBATABLE WHETHER A CASE THAT OFFERS A USEFUL ANALOGY “DIRECTLY RELATES” TO AN ISSUE, AND (2) THIS STANDARD EFFECTIVELY INJECTS A SECOND ISSUE INTO ANY ARGUMENT SUPPORTED BY AN UNPUBLISHED CASE THAT COULD LEAD TO SUCH AN ARGUMENT BEING DEEMED “ABANDONED” BECAUSE UNSUPPORTED BY AUTHORITY DEEMED CITABLE.

THE PROPOSED AMENDMENT TO SUBSECTION B, DELETING THE PUBLICATION CRITERION THAT THE OPINION "EXTENDS AN EXISTING RULE OF LAW TO A NEW FACTUAL CONTEXT" SEEMS TO STRIKE AT THE ROOT OF A SYSTEM BASED ON *STARE DECISIS*: THAT CRITERION DESCRIBES HOW THE COMMON LAW IS DEVELOPED INCREMENTALLY THROUGH JUDICIAL DECISION.

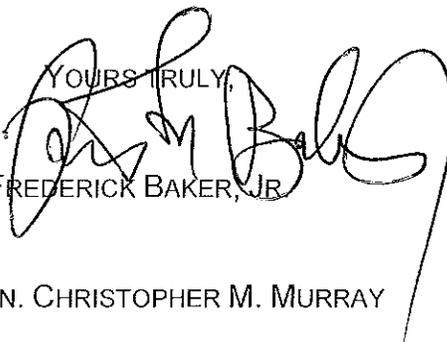
THE COMBINATION OF THESE TWO AMENDMENTS SEEMS AN UNWARRANTED RESTRICTION ON THE USE OF INCREASINGLY SCARCE COURT OF APPEALS PRECEDENT.

I SERVED THE COURT OF APPEALS IN 1976-1978, CULMINATING IN A LITTLE OVER A YEAR AS THE LATE JUDGE DANHOF'S LAW CLERK. **IN 1975 THE COURT OF APPEALS – WHICH THEN HAD ABOUT HALF AS MANY JUDGES – PUBLISHED 9.2 VOLUMES OF OPINIONS.** I WAS A FLY ON THE WALL WHEN JUDGE DANHOF URGED THE JUDGES TO REDUCE THE NUMBER OF PUBLISHED OPINIONS, TO REDUCE THE EXPENSE OF PUBLISHING SO MANY VOLUMES. THEY HEEDED HIM: **FROM 2004 TO 2014 A COURT WITH NEARLY TWICE AS MANY JUDGES PUBLISHED ONLY 4.2 VOLUMES A YEAR.**

THIS DRASTIC REDUCTION OF THE COURT'S PRECEDENTIAL OUTPUT DID NOT MATTER, BECAUSE ITS MANY UNPUBLISHED OPINIONS ARE AVAILABLE ONLINE. THE COURT OF APPEALS IS NOT BOUND BY THEM, BUT THEY OFTEN HAVE PERSUASIVE VALUE WHEN THEY ARE FACTUALLY MORE SIMILAR TO A CASE AT ISSUE THAN ANY PUBLISHED DECISION APPLYING THE SAME LAW.

I SUGGEST THAT IT WOULD BE UNFORTUNATE FOR THE COURT, AT ONCE, TO BLIND ITSELF TO UNPUBLISHED PAST DECISIONS AND DISCARD PERHAPS THE SINGLE MOST IMPORTANT PUBLICATION CRITERION. AS THIS COURT OBSERVED IN *MICHCON v MPSC*, 389 MICH 624, 631 (1971), "WISDOM SO OFTEN NEVER COMES THAT IT OUGHT NEVER BE REJECTED MERELY BECAUSE IT COMES LATE," TO WHICH I WOULD ADD, "OR BECAUSE IT WAS CONTAINED IN AN UNPUBLISHED OPINION."

I URGE YOU TO REJECT OR TEMPER THE PROPOSED AMENDMENTS TO MCR 7.215 (B)(3) AND (C).

YOURS TRULY,  
  
FREDERICK BAKER, JR.

ENCL/ 7 COPIES

CC: HON. ELIZABETH GLEICHER, HON. CHRISTOPHER M. MURRAY